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No.

In the

Supreme Court of the United States

OCTOBER TERM, 1972

72-928

JOSEPH J. DROBNICK, Et Al.,

Petitioners,

vs.

JOSEPH ANDRULIS (for whom Vera Andrulis, Executor of the Will of Joseph Andrulis, Deceased, has been substituted),

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS SECOND DISTRICT

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JEROME P. DROBNICK, *pro se*
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PETITION FOR WRIT OF CERTIORARI TO THE APPELLATE COURT OF ILLINOIS SECOND DISTRICT

Petitioners, Joseph J. Drobnick, Jereome P. Drobnick, Mark J. Drobnick as Trustee and the First National Bank of Lake Forest as Trustee under Trust No. 568 pray that a writ of certiorari issue to review the judgment and decision of the Illinois Appellate Court of the Second District at Elgin, Illinois.

OPINION BELOW

The opinion of the Illinois Appellate Court, Second District is reported in full and is appended to the Appendix in full in this petition. A timely petition was filed with the Illinois Supreme Court requesting leave to appeal, but such a petition was denied without opinion. The mandate was stayed pending the disposition of the Appellants' Petition for Writ of Certiorari to the United States Supreme Court.

JURISDICTION

The judgment and decision of the Illinois Appellate Court was entered March 22nd, 1972. A Petition for Rehearing was filed in the Appellate Court in due time and it was denied May 1st, 1972.

A Petition for Leave to Appeal was filed in due time in the Supreme Court of Illinois and it was denied on September 28, 1972. Order was entered on the 24th of October by the Supreme Court of Illinois staying the mandate pending the disposition of a petition for writ of certiorari in the Supreme Court of the United States.

The jurisdiction of this Court is invoked under U. S. C. A. 1331 as the matter arises under the Constitution and the laws of the U. S. and the amount in question exceeds $10,000.00.

The jurisdiction of this Court is further invoked under the United States Supreme Court Rule 19 (a). And the cases that sustain jurisdiction are,

Legullion v. *Davis,* 115 Fed Supp. 392
Lacomaster Corp. v. *Parker,* 54 Fed Supp. 138.

and the due process clauses of U.S. and Ill. State Constitutions.

Constitutional Provisions and Statutes of Illinois Involved in this Appeal are as Follows:

1. *From the Constitution of the United States:*

(a) *Amendment V,* reading:

"No person shall . . . be deprived of life, liberty, or property, without due process of law. . . ."

(b) *Amendment XIV,* reading:

". . . nor shall any State deprive any person of life, liberty or property, without due process of law. . . ."

2. *From the Constitution of the State of Illinois:*

(a) *Section 2 of Article II,* reading:

"No person shall be deprived of life, liberty or property without due process of law."

(b) *Section 8 of Article VI,* reading:

"There shall be no masters in chancery or other fee officers in the judicial system."

(c) *Paragraph 8 of the Schedule to Article VI,* reading:

"Notwithstanding the provisions of Section 8 of this Article, masters in chancery and referees in office in any Court on the Effective Date of this Article shall be continued as masters in chancery or referees, respectively, until the expiration of their terms, and may thereafter by order of court, whenever justice requires, conclude matters in which testimony has been received."

3. *From Chapter 90 (Repealed), 1963 Illinois Revised Statutes:*

(a) *Section 2,* reading:

"The tenure of office of Masters in Chancery shall be two years, but they may be removed from office by the court for which they are appointed, for good cause shown."

(b) *Section 4,* reading:

"Every Master in Chancery, before entering on the duties of his appointment, shall give bond, with security to be approved by the court, and take and subscribe an oath of office. . . ."

4. *From Chapter 106, Illinois Revised Statutes—Partition:*

Section 44, reading:

"When lands, tenements or hereditaments are held in joint tenancy or tenancy in common . . . any one or more of the persons interested therein may compel partition thereof by complaint in chancery. . . ."

5. *From Chapter 106½, Illinois Revised Statutes—Partnership:*

(a) *Section 18,* reading:

"The rights and duties of the partners in relation to the partnership, shall be determined, subject to any agreement between them, by the following rules: . . .

(b) The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property. . . .

"(e) All partners have equal rights in the management and conduct of the partnership business.

"(f) No partner is entitled to remuneration for acting in the partnership business, except that a surviving partner is entitled to reasonable compensation for his services in winding up the partnership affairs."

Section 23, Continuation of partnership beyond fixed term, reading:

"(1) When a partnership for a fixed term or particular undertaking is continued after the term or

particular undertaking without express agreement, the rights and duties of the partners remain the same as they were at such termination, so far as is consistent with a partnership at will."

Section 25, Partnership Property—Rights of Parties, reading:

"(1) A partner is co-owner with his partners of specific partnership property holding as a tenant in partnership.

"(2) The incidents of this tenancy are such that:

"(b) A partner's right in specific partnership property is not assignable except in connection with the assignment of the rights of all the partners in the same property.

"(d) On the death of a partner his right in specific partnership property vests in the surviving partner or partners, except where the deceased was the last surviving partner, when his right in such property vests in his legal representative. . .

"(e) A partner's right in specific partnership property is not subject to dower, curtesy, or allowances to widows, heirs or next of kin."

Section 26, Interest of Partner, reading:

"A partner's interest in the partnership is his share of the profits and surplus, and the same is personal property."

Section 27, Effect of conveyance of interest of partner, reading:

"(1) A conveyance by a partner of his interest in the partnership does not of itself dissolve the partnership. . . ."

Section 29, Dissolution of partnership defined, reading:

"The dissolution of a partnership is the change in the relation of the partners caused by any partner ceasing to be associated in the carrying on as distinguished from the winding up of the business."

Section 30, Effect of dissolution, reading:

"On dissolution the partnership is not terminated, but continues until the winding up of partnership affairs is completed."

Section 31, When dissolution is caused, reading:

"Dissolution is caused: . . .

"(4) By the death of any partner. . . .

"(6) By decree of Court under Section 32."

Section 37, Who may wind up partnership affairs, reading:

"Unless otherwise agreed the partners who have not wrongfully dissolved the partnership or the legal representative of the last surviving partner, not bankrupt, has the right to wind up the partnership affairs; Provided, however, that any partner, his legal representative or his assignee, upon cause shown, may obtain winding up by the Court."

Section 40, Settlement of Accounts between partners, reading:

"In settling accounts between the partners after dissolution, the following rules shall be observed, subject to any agreement to the contrary:

"(a) The assets of the partnership are:

"I. The partnership property,

"II. The contributions of the partners necessary for the payment of all the liabilities specified in clause (b) of this paragraph.

"(b) The liabilities of the partnership shall rank in order of payment as follows:

"I. Those owing to creditors other than partners.

"II. Those owing to partners other than for capital and profits.

"III. Those owing to partners in respect of capital.

"IV. Those owing to partners in respect of profits.

"(c) The assets shall be applied in the order of their declaration in clause (a) of this paragraph to the satisfaction of the liabilities."

6. *From Chapter 3, Illinois Revised Statutes—Administration of Estates:*

Section 189, Article XVI—Partnership Estates, reading:

"The surviving partner may continue in possession of the partnership estate, pay its debts and settle its business, shall account to the executor or administrator of the estate of the decedent, and shall pay over such balances as may from time to time be payable to him. Upon verified petition of the executor or administrator or its own motion the court whenever it appears necessary may order the surviving partner to account to the court."

THE ISSUES PRESENTED FOR REVIEW

1. Did Mr. Dalziel violate the due process clauses of the United States Constitution and the Constitution of Illinois in conducting proceedings as he lacked authority to act?

2. Did the death of the plaintiff Joseph Andrulis dissolve the partnership as a matter of law and vest in the surviving partners Joseph J. Drobnick and Jerome P. Drobnick, the right and duty to wind up the partnership affairs?

STATEMENT OF FACTS

The relevant facts in this case are set out in the Opinion of the Court, attached hereto as Appendix to this Petition. Omitted from the Appellate Court Opinion, however, are the salient facts that the cause of action herein was commenced by the Plaintiffs who asserted that there were sums due them from a partnership accounting and the Decree which found that there was owed to the Defendants (rather than any amount owed by them) a sum in excess of $15,000.00 and no amount was due to the Plaintiffs in the case.

REASONS FOR GRANTING THE WRIT

1. THE DECREE AND THE APPELLATE COURT OPINION ARE BASED ON FINDINGS MADE BY A PERSON HAVING NO STATUS IN THE JUDICIAL SYSTEM. THUS VIOLATING THE DUE PROCESS CLAUSES OF THE ILLINOIS STATE AND THE UNITED STATES CONSTITUTION.

On January 22, 1962, when the trial court entered an order referring this case to Mr. Daniel J. Dalziel to try the issues, hear the evidence and report his findings and conclusions (A. 52), Mr. Dalziel's prior appointment as a Master in Chancery of the Circuit Court had expired. He was reappointed on November 6, 1963 (A. 90) to another two-year term ending after the abolition of the office of Master in Chancery by the Amendment of Section 8 of Article VI of the Illinois Constitution, which became effective (subject to the Schedule to Article VI), on January 1, 1964. After he had taken his oath of office and made bond on his appointment of November 6, 1963, no order was made referring this case to him—nor was any order made after January 1, 1964, which would have enabled him to conclude the matter if there had been a proper reference to him while he was a Master.

Mr. Dalziel was not a Master in Chancery when the order of reference was made, nor was he a Master when he prepared his so-called Report on Proofs, dated November 4, 1966, nor when he heard objections thereto, nor when he prepared his Rulings on Objections dated October 3, 1967.

Discovery of this extraordinary state of affairs prompted the defendants' motion of January 22, 1968

to strike the order of reference, to suppress and expunge Mr. Dalziel's reports and their further motion for a trial de novo (A. 87).

The Appellate Court seeks to dispose of the status of Mr. Dalziel by calling him a "de facto" master. This is the first time in Illinois that the "de facto" status is extended to the Judicial System. The cases cited are not in support of that standing (as will be discussed below), but if such status is to be extended to "volunteer judges", the statement of the law to that effect should come from the U. S. Supreme Court. A statement that "volunteer" decisions are to be binding and appealable then would make them part of the judicial process. An agreement for the submission of contested matters to a third party should not replace the regular routine of properly appointed or elected judges. In this respect, judicial officers differ from Executive or Legislative in that the Judicial officer under our system is the final arbiter of the legality of the actions of governing officials.

Lest the Court assume that the question lacks present day importance because of the discontinuance of the Master in Chancery as a part of our judicial system, the Court's attention is called to the fact that the same question would apply to all arbitrators or judges who make determinations of fact and law as to the rights of citizens in this country. Attention is called to the large increase in the number of judges, associate judges and magistrates in the recent years since the adoption of the new judicial article and the recognition by courts that these men must be properly appointed, their jurisdiction circumscribed and defined just as formerly Masters in Chancery were required to operate under orders of reference from the Judiciary. The question remains even though we no longer have Masters in Chancery.

The cases cited by the Appellate Court in support of the theory that there is such a status as "de facto" judicial officer do not support its findings. In *Freese* v. *Glos*, 248 Ill. 280, 93 N.E. 745, the Master in Chancery referred to was actually a De Jure Officer whose order of reference was defective in wording. The case of *People* v. *Severinghaus*, 313 Ill. 456, 145 N.E. 220, involved a notary public. The case of *People ex rel. Engle* v. *Kerner*, 32 Ill. 2d 212, involved a Judge of election. *People* v. *Board of Review*, 19 Ill. 472, 478, 94 N.E. 2d 424, involved the Board of Review and *Howard* v. *Burke*, 248 Ill. 224, involved a member of the school board. If this case stands, it will be the first time that citizens have been subjected to findings of "de facto" members of the Judiciary (*Locomaster Corp.* v. *Parker*, 54 Fed. Supp. 138).

2. THE JUDGMENT OF THE APPELLATE COURT AND THE DECREE WHICH IT AFFIRMS CONSTITUTE SUCH CONTRADICTORY FINDINGS AS TO MAKE THE DISPOSITION OF THIS CASE A MOCKERY.

The Appellate Court Opinion herein affirms a Decree requiring sale of partnership realty at the same time giving lip service to the correct theory of the law that there can be a partition of real estate only in cases where the real estate is held in joint tenancy or tenancy in common and it seeks to justify this finding on two bases:

1) That there is actually no partition directed;

2) That the Defendants breached a fiduciary relationship as partners and the sale is under the Partnership Act.

As to whether or not the Trial Court directed a partition, attention is directed to Paragraph 30 of the Decree (A. 144 L) and the appointment of a Commissioner to

make partition (A. 148-149). If the Trial Court decree is affirmed, there is a direct conflict between the Appellate Court Opinion and the affirmed Trial Court Decree. How is the Trial Court to carry out its ruling in the light of the Appellate Court interpretation of the Law? In order to avoid violating the constitution, the U. S. Supreme Court must Act.

As to the allegation that partnership obligations were breached, we call the Court's attention to the Pleadings in this case and the findings in the Decree of the Trial Court.

In Count I of the Amended Complaint (A. 29), Joseph Andrulis (who died September 10, 1966) sought an accounting with his other partners and others, claiming that upon an accounting there would be found due to him from the Defendants a "large sum of money" (A. 31). He demanded judgment "Against the Defendants for any sums found to be due the Plaintiff from the Defendants." Defendants answered that "such an accounting would disclose that money was due said partnership from said plaintiff."

For Joseph Andrulis, deceased, his Executor, Vera Andrulis, was substituted but she filed no supplemental or amended pleading asking relief. Nevertheless, the decree appealed from in Paragraph 28 (A. 144e) finds that, ". . . Joseph Andrulis (sic) is liable to pay Joseph and Jerome Drobnick, out of the partnership proceeds upon dissolution, the sum of $15,711.99." (The decree makes no mention of the fact that by statute dissolution had already occurred on September 10, 1966). In paragraph 32 of the decree it is then found that, ". . . the partnership real estate should be sold and the proceeds divided and distributed on this basis and in this priority:

"a) Payment of any legitimate expenses incurred since Dec. 31, 1964 for which defendants can show valid receipts or vouchers,

"b) Payment of $15,711.99 to Joseph and Jerome Drobnick, as joint tenants" etc., etc. (A. 145)

and then in Paragraph 3 of the ordering part of the decree (A. 148) it is ordered "that said partnership real estate should be sold—and the proceeds from the sale divided and distributed—in accordance with Paragraph 32 of this order."

Thus we have had Joseph Andrulis (now deceased) claiming moneys from Joseph and Jerome Drobnick, who answer not that Andrulis was indebted to them, but that money is due the partnership from him, and in the end here is a decree which after declaring that Joseph Andrulis (a dead man) is liable to pay Joseph and Jerome Drobnick, out of the proceeds of a partnership dissolution the sum of $15,711.99, then orders that said Drobnicks, as joint tenants be paid $15,711.99 out of the proceeds of a partition sale of partnership land! What utter confusion of the rules of pleading, the laws relating to the partition of real estate and the rules laid down by the Uniform Partnership Act!

Despite the fact that the agreement of March 18, 1946, required Mr. Andrulis and Mr. Coroneos to advance all necessary funds for taxes and other expenses (A. 9), paragraph 21 of the decree (A. 144j) finds that by the end of 1964 the Defendants had advanced $99,699.21 (plus a further item of $2,480.95 as found in paragraph 22), so that since 1951 the partnership has owed the defendants money and was accumulating a deficit of $28,984.15 (Par. 23) which with interest through 1964 produced a total deficit of $38,921.57 (Par. 26). This deficit, after crediting Joseph Andrulis for $6,026.79 plus interest leaves

$31,423.98 (Par. 26) (one half of which $15,711.99) "Joseph Andrulis (sic) is liable to Joseph and Jerome Drobnick, out of the partnership proceeds upon dissolution" (Par. 28) (A. 144L).

Not being accountants, we find ourselves somewhat bewildered by this strange computation and are sure of only three things: 1) that it shows that Joseph Andrulis in his lifetime utterly failed in his contract obligation to furnish one-half of the funds needed to keep the business of the partnership in good standing; 2) that the computation does not take into consideration that Jerome P. Drobnick alone purchased the interest of Coroneos (Par. 29) and, 3) it completely failed to meet the standards of Section 40 of the Illinois Uniform Partnership Act on the settlement of accounts between partners.

We think this Court will find much difficulty in stretching the unfair critiques embodied in Paragraph 16 of the decree into vicious and prejudicial delinquencies which would justify an order apparently intended to take from the defendants the right and duty to wind-up, which devolved upon them upon the death of Mr. Andrulis, whose personal differences with Joseph Drobnick were permanently terminated on Mr. Andrulis' death on September 10, 1966.

The energy, industry and imagination displayed by the defendants over the long period from 1946 to November 13, 1970 is sadly rewarded by this unconscionable order providing that they can no longer exercise the rights granted them and perform the duties enjoined upon them as surviving partners by the Uniform Partnership Act.

Mr. Andrulis according to this decree, invested at most in this joint venture $27,626.79. Computing interest thereon at 5% per annum would produce a sum in the general

area of $70,000. His estate has already demanded and received on account $45,000. (A. 118). Should this amazingly successful venture abruptly end with a forced sale when the Andrulis Estate has only to receive $25,000 to make it whole? We contend that to wink at all the firmly established principles of partnership law and of equity would be a bitter ending to a well-conceived and brilliantly executed joint venture by men having faith in the future of their native city. There has been no misconduct on the part of the surviving partners. If there are "fictions" to be considered there, they are not the inventions of the law, but rather the evil imaginings of willfully uninformed persons, —uninformed as to the facts as well as the law. The defendants under the plainest of constitutional principles are entitled to a trial de novo, if not a simple reversal of the decree below.

We respectfully submit that the Opinion of the Appellate Court herein creating the status of "de facto" judicial officers is without precedent in Illinois and should be examined by this Supreme Court to determine if this status is to be recognized as part of the Judicial System of the State of Illinois and of other States of this Union.

We further submit that the Court should grant the Petition for Writ of Certiorari in this case for the purpose of establishing a firm foundation on which real estate owned by this partnership can be disposed of without the necessity of an involuntary sale.

A forced sale by an outsider is in violation of the statutory rights and constitutional rights of the parties, Joseph and Jerome P. Drobnick, who own two-thirds interest in the partnership, are creditors of the partnership, and are the parties who have nurtured the assets so that a small portion of them have been sold for many times the initial contribution.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari to review the Opinion of the Appellate Court of Illinois Second District should be granted.

Respectfully submitted,

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APPENDIX

JUSTICE WILLIAM R. NASH DELIVERED THE OPINION OF THE COURT:

Defendants Joseph and Jerome Drobnick appeal from a decree of the Circuit Court of Lake County in which an accounting was made and a winding up commenced of a partnership in real estate between defendants and the original plaintiff, Joseph Andrulis. Andrulis died during the course of this ten-year litigation and his executor, Vera Andrulis, was duly substituted in his stead.

The trial court determined the existence of the partnership, the liabilities of the partners to it and their respective interests in its property. It further found that the assets of the partnership consisted of certain real estate which could not be divided between the partners without destroying its value for development purposes and, therefore, should be sold and the proceeds applied to the partnership liabilities and distributed to the partners as their respective interests were found to be in the decree.

Two issues are presented for review: 1) Do infirmities in the appointment of the master in chancery in this case require trial de novo? 2) Was a statutory partition of the partnership real estate decreed by the court?

A written partnership agreement was entered into between Joseph Andrulis and the defendants in 1946 (together with another person whose interest defendants have since acquired) for the purpose of dealing in real estate for a ten year term. After term, the partners not having been able to agree on a division of assets, Andrulis initiated this action for an accounting to him by his

partners of his interest in the partnership and the partition of those properties found to be subject to division between the partners.

The trial court referred the matter to its then acting master in chancery, Daniel Dalziel, who conducted hearings on the issues during the years 1962 through 1965 and on November 7, 1967, by order of the trial court, filed his report and findings. Thereafter, on January 22, 1968, defendants moved the trial court to strike its order of reference to the master made in 1962, expunge the master's report and for trial de novo of the issues in this case. Defendants' motion was denied, the master's report confirmed, and the decree herein entered accordingly.

Defendants contend first that Daniel Dalziel was not a master in chancery when the order of reference was made in 1962, and, in absence of a further order of court extending his term for consideration of this case, he lost authority to do so after January 1, 1964, the effective date of the amendment to the Illinois Constitution of 1870 abolishing the office of master in chancery.

In their brief defendants rely upon citations of statute and various articles of the Illinois and United States Constitutions to support their view due process requires trial de novo of this case. No other citations of authority are suggested by defendants for our consideration.

It is not disputed that Mr. Dalziel had served as master of the trial court prior to the referral of this case, having been previously so appointed for a term commencing January 1, 1960, and extending to December 31, 1961, "and until his successor shall have qualified." He was next reappointed to that office by order entered November

6, 1963, for a period extending to November 6, 1965, "and until his successor shall have qualified." At each appointment the master duly filed his bond and oath.

It may fairly be seen from the record of this case that the trial court and all of the parties considered Mr. Dalziel to be the duly appointed, as well as acting, master of the trial court. The parties appeared before him for twenty-seven hearings over these years in which numerous witnesses testified, including the now-deceased partner, Joseph Andrulis. The master has certified to the court that he applied 317 hours to consideration of this case prior to filing his report in 1967 by order of the court. No objections to the master's status were made by defendants at any time before he filed his report in form substantially adverse to defendants' position in the case.

It has been well settled that an officer who holds over after expiration of his term is regarded as a de facto officer whose acts are as valid and binding where they concern the rights of third persons or the public as though he was a de jure officer. Title to such an office can only be decided in a direct proceeding brought for that purpose. (People v. Woodruff, 9 Ill. 2d 429, 437; 137 NE 2d 809; 29 I.L.P., Officers, Section 5, page 60; 67 C.J.S., Officers, Section 141, page 444). In People ex rel. Jones v. Beach, 77 Ill. 52, the court considered the status of a hold-over master in chancery, stating:

> "Relator from that time (the expiration of his term) until appellee was appointed, was, no doubt, an officer de facto, and as such his acts would be binding as to all persons, including his sureties on his official bond, as his right to the office can only be questioned by a proceeding of this character (quo warranto)".

In Pritchett v. People, 6 Ill. 525, the court considered a similar question in a suit on the bond of an administrator who had been appointed by a probate judge after the judge's term had expired and before his reappointment to that office. The court held the judge was a de facto probate judge, stating at page 529:

> "It is sufficient for all the purposes of this case if he was de facto, the Judge of Probate. It is a general principle of law, that the ministerial acts of an officer de facto are valid and effectual when they concern the public, and the rights of third persons, although it may appear that he has no legal or constitutional right to the office. The interests of the community imperatively require the adoption of such a rule."

The principles stated giving a de facto officer the same status as between the public and the parties for whom he acts as a de jure officer have, for good reason, been consistently followed in the reported cases. (People ex rel. Engle v. Kerner, 32 Ill. 2d 212; 205 NE 2d 33; Harvey v. Sullivan, 406 Ill. 472, 478, 94 NE 2d 424; People v. Board of Review, 19 Ill. 2d 424; Howard v. Burke, 248 Ill. 224, 93 NE 775; People v. Severinghaus, 313 Ill. 456, 145 NE 220; Freese v. Glos, 248 Ill. 280, 93 NE 745.)

The amendment to the judicial article of the Constitution of 1870 abolishing the office of master in chancery effective January 1, 1964, did not alter the status of the master in this case. (Article 6, Section 8, Constitution of 1870; Paragraph 8, Schedule to Article 6, Constitution of 1870).

The implementing schedule of the amendment to the judicial article provided that a master in chancery in office on January 1, 1964, shall continue in that office

to the end of his term, "and may thereafter by order of court, wherever justice requires, conclude matters in which testimony has been received." On that date, the master in this case was in office, by statutory appointment, in a term ending November 6, 1965. He had received the testimony of this case and, by order of court, he concluded his consideration of this matter and filed his report on November 7, 1967. The requirements of the schedule and the constitution were met. (Rules of Supreme Court, 1965, Rule 14-1, Masters in Chancery).

Defendants do not present any issue as to the conduct of the hearings before the master, the evidence there received, the conclusions reached by the master or the findings entered thereon by the trial court. Nor do they assert that any prejudice to them resulted from the procedural oversight of a timely reappointment of the master at the initial referral to him in 1962 or at any other time.

We conclude that Mr. Dalziel was the duly appointed and acting master in chancery of the trial court during most of the times questioned in this appeal and that at all other times was de facto master. The trial court correctly considered the master's report filed in this case and a trial de novo of the issues is not required.

Defendants further contend the trial court may not decree the partition sale of the partnership real estate pursuant to the provisions of the Partition Act, Ill. Rev. Stat., Ch. 106, Section 44, et seq. We agree and find that the trial court does not do so here.

Real estate of a partnership is, by both statute and decision, deemed personal property insofar as the interests of the individual partners are concerned and it

remains personalty for purposes of distribution after dissolution and the winding up of the affairs of the partnership. (Uniform Partnership Act, Ill. Rev. Stat. Ch. 106½, Section 26; Wharf v. Wharf, 306 Ill. 79, 85-86, 137 NE 446; Swirsky v. Horwich, 382 Ill. 468, 47 NE 2d 452; Escarraz v. Escarraz, 15 Ill. App. 2d 262, 268, 145 NE 2d 772).

On the death of a partner his interest in partnership property, including real estate, vests in the surviving partners; as a partner's interest in a partnership is his share of the profits and surplus, it so vests as personal property to be held by the surviving partners in trust subject to such winding up processes as may be undertaken by them or, in the proper case, by the court. (Uniform Partnership Act, Ill. Rev. Stat., Ch. 106½, Sections 32 and 37; In Re Estate of Trapani, 21 Ill. App. 2d 19, 32 and 36, 157 NE 2d 83).

It necessarily follows in this case that the realty in issue vested in the defendants, as surviving partners, on the death of Joseph Andrulis and was not, therefore, held in a tenancy which the present plaintiff, the deceased partner's legal representative, which can be subject to partition under Section 44 of the Partition Act.

As earlier noted, on the death of Joseph Andrulis his executor was substituted as plaintiff and the cause proceeded to an accounting and determination by the court of the interests in and liabilities of the partners in the partnership. The decree found, too, that the partnership should be dissolved by the court, pursuant to Section 32 of the Partnership Act, by reason of the failure of defendants, as managing partners, to fully comply with their fiduciary responsibilities to the partnership. Control of the winding up of the affairs of the partnership was

retained by the court as it is authorized to do, on cause shown, under Section 37 of the Partnership Act.

No issue is raised suggesting any lack of authority in the trial court, in the exercise of its equitable powers, to direct a judicial sale to the partnership realty found necessary to wind up its affairs by the court. (See Chancery, Ill. Rev. Stat., Ch. 22, Sections 42, 48; 68 C.J.S., Partnerships, Section 438, page 987). On this appeal, defendants direct our attention only to that portion of the decree purporting to require such sale pursuant to the Partition Act and the resultant attorney's fees there authorized.

There is ambiguous language contained in the decree wherein it directs the commissioner, who was appointed by the court to appraise the real estate, to partition it if that can be done without injury to the parties. We do not consider that direction as requiring or authorizing a sale of the property under the Partition Act. The trial court had determined the property could not be divided without injury to its value and must be sold intact and, at most, it may be considered a prudent direction by the court for the commissioner to currently consider that question in making his appraisal and report to the court as the terms and conditions of sale have not yet been fixed by the court nor has an order of sale yet been entered.

It has been generally held that in the absence of an authorizing statute, or in certain other circumstances not here applicable, attorney's fees will not be allowed. (House of Vision, Inc. v. Hiyane, 42 Ill. 2d 45, 51, 245 NE 2d 468). That view was followed in an earlier case concerned with a partnership accounting. (Cooper v. McNeil, 9 Ill. App. 97). Since no such fees have been fixed or ordered

paid in this case, however, we will not further consider that issue here.

A portion of defendants' reply brief argues matters neither raised by them in their original brief nor responsive to the arguments presented in plaintiff's brief. These issues will not be considered by us. (Supreme Court Rule 341 (g), Ill. Rev. Stat., Ch. 110A, Sec. 341 (g).)

This litigation has progressed slowly over an inordinately long period of time. The circumstances with which the trial court has been presented have been unusual and have been met fairly to all of the parties and in accord with law. We have previously stated in Ziegler v. Smith, 86 Ill. App. 2d 215, 224, 229 NE 2d 340, that:

> "The object of the review of judgments of trial courts is not to determine whether the record is free from error but to ascertain whether a just conclusion has been reached, founded upon competent evidence, in a trial in which no error has occurred which might be prejudicial to a litigant's rights."

We believe that object is reflected in the decree of the trial court here and, therefore, it will be affirmed and this cause remanded for such further proceedings as may be necessary in accordance with the decree and the opinion of this court.

DECREE AFFIRMED.

GUILD, J., and ABRAHAMSON, J., concur.